G.M. & S.G. [two men; they appear to have been the lead couple], Italian *Corte Costituzionale*, *Sentenza* (judgment) No. 138/2010 (14 April 2010)
[15 judges: 14 men and only 1 woman!]
...
6 - The entire regulation of marriage, contained in the Civil Code and in specific legislation, assumes that spouses are of different sexes. The majority of academic commentators agree, as do statements in three judgments of the *Corte di Cassazione* [Italy's highest civil court].

7 - It must therefore be determined whether the Italian Constitution requires a declaration that the challenged legislation is invalid, and that civil marriage must be extended to same-sex couples.

8 - [Art. 2: The Republic recognises and guarantees the inviolable rights of the person, both as an individual and in the social groups, *formazioni sociali*, where human personality is expressed. ...]

A "social formation" includes every form of community, simple or complex, suited to permit and encourage the free development of the person in the relationships aspect of life, in a context that stresses the pluralistic model. In the notion of "social formation" must also be counted the homosexual union, understood as stable cohabitation between two persons of the same sex, which lies within the province of the fundamental right to live freely a condition of couple, obtaining - at the times, in the manner and within the limits established by the law - legal recognition with connected rights and duties.

However, it is not the case that the aspiration to this recognition - which necessarily assumes regulation of a general character, designed to determine the rights and duties of the members of the couple - can be realised only through the equalisation of the rights of homosexual unions and those of married couples. It is sufficient to examine, not even exhaustively, the legislation to date of countries that have recognised these unions to demonstrate the diversity of choices made by legislatures.

It follows therefore that, within the scope of Article 2, it is up to Parliament, in the exercise of its full discretion, to determine the forms of security and recognition for these unions, it being reserved to the Constitutional Court the possibility of intervening to protect specific situations (as has happened in two cases involving unmarried different-sex couples). It could happen, in fact, that, in particular circumstances, it could be found that it is necessary to treat in the same way the conditions of a married couple and those of a homosexual couple, which treatment this Court can secure through its review of reasonableness.

9 - [Art. 3 All citizens have equal social dignity and are equal before the law, without distinction of sex, race, language, religion, political opinion, personal and social conditions. **...** Art. 29 The Republic recognises the rights of the family as a natural society founded on marriage. Marriage is based on the moral and legal equality of the spouses within the limits laid down by law to guarantee the unity of the family.]

The issue raised with regard to Articles 3 and 29 is without foundation.
...
... [I]t is true that the concepts of family and marriage cannot be seen as "crystalised"

with reference to the period when the Constitution entered into force, because ... they are interpreted taking into account ... the evolution of society and customs. This interpretation, however, cannot however be pushed to the point where it collides with the nucleus of the rule, modifying the rule in such a way as to include within it phenomena and problems in no way considered when the rule was enacted.

In fact, as is clear from the cited legislative history, the question of homosexual unions was entirely outside the debate in the [Constituent] Assembly, even though the homosexual condition was certainly not unknown. The drafters of the Constitution [which came into force on 1 Jan. 1948] ... had in mind the notion of marriage defined in the Civil Code of 1942 ...

This meaning of the constitutional precept cannot be overridden through interpretation, because it would not be a simple re-reading of the system, or the abandonment of a mere interpretative routine, but rather would involve a creative interpretation.

It must be confirmed, therefore, that the rule does not take into consideration homosexual unions, but rather intends to refer to marriage in the traditional meaning of this institution.

It is not by chance, after all, that the Constitution, after dealing with marriage, found it necessary to deal with the protection of children (art. 30) ... The just and necessary protection of children born out of wedlock takes nothing away from the constitutional importance attributed to the legitimate family and to the (potential) procreative purpose of marriage which serves to differentiate it from the homosexual union.

As for Article 3, the challenged provisions of the Civil Code ... cannot be considered constitutionally invalid. This is either because the provisions are founded on Article 29, or because they do not give rise to an unreasonable discrimination, in that homosexual unions cannot be considered the same as marriage. ...

10 - It remains to examine Article 117. [Legislative powers shall be vested in the State and the Regions in compliance with the Constitution and with the constraints deriving from EU legislation and international obligations.]
The referring court cites the European Convention on Human Rights, Articles 8 (respect for private and family life), 12 (right to marry) and 14 (prohibition of discrimination), stressing the judgment of the European Court of Human Rights in Christine Goodwin v. United Kingdom (11 July 2002). The referring court also cites the corresponding Articles of the Charter of Fundamental Rights of the European Union (7, 9 and 21), resolutions of European institutions (including a [1994] resolution [of the EU's European Parliament], calling on EU member states to grant same-sex couples access to marriage or an equivalent legal framework), and developments in national law in many countries, with legal systems similar to Italy's, where the notion of family relations is being developed in a way that includes homosexual couples.

It must be observed that: (a) the Christine Goodwin judgment is not relevant, because it deals with a specific situation in United Kingdom law (inability of a transsexual woman to have her legal sex recognised as female, and to be able to marry a non-transsexual man) which had already been addressed in Italian law; (b) the relevant Articles of the European Convention and the EU Charter are the specific ones on marriage (12 and 9), not the more general ones on private and family life (8 and 7) or non-discrimination (14

and 21).

[European Convention, Article 12, adopted in 1950: "Men and women of marriageable age have the right to marry and found a family, according to the national laws governing the exercise of this right."]

[EU Charter, Article 9, adopted in 2000: "The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights."]

... Both Article 9 and Article 12 refer to national laws governing the exercise of the right to marry. The explanations that accompanied the Charter clearly state that Article 9: "neither prohibits nor imposes the granting of the status of marriage to unions between people of the same sex".

... Once again, with the reference to national laws, it is confirmed that this subject is entrusted to the discretion of Parliament.

A further indication of this can be deduced from the choices and solutions adopted by numerous countries that have introduced, in some cases, a real and proper extension to homosexual unions of the regulation applying to civil marriage or, more frequently, forms of protection that are very different and that range from near equalisation of these unions and marriage to a clear distinction between these unions and marraige, with regard to their effects. ...

for these reasons

THE CONSTITUTIONAL COURT

the judges gathered together:

(a) declares inadmissible the challenge to the provisions of the Civil Code under Articles 2 and 117 of the Constitution;

(b) declares without foundation the challenge to the provisions of the Civil Code under Articles 3 and 29 of the Constitution.

So decided in Rome, at the seat of the Constitutional Court, Palazzo della Consulta, 14 April 2010.